United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

10/16

74-1853

B/S

To be argued by
VINCENT L. LEIBELL, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

SHINKO BOEKI CO., LTD.,

Plaintiff-Appellant,

against

S.S. "PIONEER MOON", her engines, boilers, etc., and UNITED STATES LINES, INC.,

Defendant-Appellee.

REPLY BRIEF OF PLAINTIFF-APPELLANT

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3

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

PAGE

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As to Defendant's Theory Of The Issue Presented For Review* (Defendant's Brief, p. 1).

Defendant concedes, once again, that this case involves "containers". It also claims, that the containers were "loaded by the shipper, designated as a 'package' by the shipper, utilized as a package and defined as a package in the contract of carriage." While only the allegation that the containers were "loaded by the shipper" is accurate, it should be noted that all of these allegations were made by the unsuccessful defendant in *Leather's Best, Inc.* v. *S.S. "Mormaclynx"*, 451 F(2d) 800, where this Court at page 815, held that a container was not a "package" but rather "functionally a part of the ship."

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* Plaintiff's Reply Brief will follow the format of the Brief of Defendant-Appellee, replying in sequence, where necessary, to the arguments therein.

As to Defendant's Statement Of "The Facts"
(Defendant's Brief, pp. 2 to 8).

Defendant four times italicizes the word "tanks". There is no question but that the synthetic latex was shipped in tanks, just as there is no question but that the tanks were 2,000 gallon metal "containers" owned by United States Lines. Incidentally, it is impossible for the type of container pictured in Appendix A, at page 1a of defendant's brief which is not an exhibit, to be a representation of the containers used in the case at bar, where the stipulated dimensions were 7′ 1″ in length, 7′ 9″ in width and 6′ 4″ in height (p. 6). A mere inspection of the picture will demonstrate that it could not be the same size as those into which plaintiff's liquid synthetic latex was poured.

An additional "fact", referred to by the defendant, at page 2, is said to be—"At no time did the shipper request a bulk shipment i.e., into the vessel's holds or deep tanks". The uncontradicted testimony of the witness John B. Grimes concerning these movable tanks is as follows—"To the Far East at that time, that was the only type of operation available for bulk shipment of latex" (Exhibit A; p. 38).** In other words, even though the S.S. "Pioneer Moon" was equipped with deep tanks (defendant's Brief, p. 7), defendant would not permit this shipment to be loaded into the deep tanks. The only tanks defendant would make available were these large metal 2,000 gallon movable tanks.

Defendant, at page 3, reproduces a section of the bill of lading to demonstrate that under the column bearing a printed heading "No. of Pkgs" the number of tanks was enumerated, along with a "Description of Pkgs. & Goods" as "Lift On Lift Off Tanks Synthetic Latex". This is the

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** References in parentheses are to pages in the Joint Appendix unless otherwise indicated.

same way the Mormaclynx bill of lading read (451 F(2d) 800, 804), where a container was held not to be a package.

Reference is made by the defendant, at pages 3 and 4, to correspondence wherein the plaintiff referred to these containers as "tanks". Apparently, the defendant's theory is that, in order for this shipment to have been considered a "bulk" shipment, the plaintiff should have said "bulk cargo" and not "tanks". As long as "tanks" are "containers" and not "packages", there can be no unfavorable legal significance in the use of the language. Furthermore, the bill of lading (Exhibit B; p. 39) sets forth only one "measurement" figure and one "gross weight in pounds" figure to cover the contents of all the tanks. In addition, the freight was calculated by the defendant on the face of its bill of lading, not on the basis of the number of tanks, but on the basis of its customary freight unit of 2240 lbs. In fact, the total "gross weight in pounds", used to calculate the freight charge, did not include the weight of the tanks (Exhibit A, p. 33). It is a certainty that, if the plaintiff had delivered 882 fifty-five gallon drums containing liquid synthetic latex, the freight charge would have included the weight of plaintiff's drums.

Defendant, at pages 4 and 5, quotes various provisions of the bill of lading and tariff which seek to provide that a container is a package. In plaintiff's brief, pages 10 to 13, Point IV was devoted to a detailed demonstration that this Court in *Leathers Best, Inc.* v. *S.S. Mormaclynx,* 451 F(2d) 800 held contract provisions of this type invalid. At no point in its brief does defendant try to refute our Point IV. Defendant simply ignores the holding of Chief Judge Friendly, and quotes the invalid provisions as if they were valid.

At pages 5 and 6 defendant quotes from the deposition of John B. Grimes, but stops short of the following question and answer:

> "Q. Do you have any knowledge as to why this shipment moved in the type of tanks that it did? A. To the

Far East at that time, that was the only type of operation available for bulk shipment of latex". (Exhibit A; p. 38)

Finally, defendant at page 8, argues that these tanks were stowed in various hatches below deck along with boxes, drums and other package cargo. While there is no proof of this, it is not material what was stowed in the same holds as these containers. Defendant cannot weaken plaintiff's claim by deciding to put packages etc. in the same hold as it chose to load these containers, which were functionally a part of the ship.

***As to Defendant's "Point I (A)"*—History and present state of the Law (Defendant's Brief, p. 8 to p. 19).**

Defendant's leading quotation is from Lord Diplock. It just so happens, that the same law firm representing the same client as *amicus curiae* in *Mormaclynx* used the same quotation. The pointed comment of Chief Judge Friendly in that case about this quotation is still valid. He wrote, "This still does not answer the question what the appropriate 'fixed limit' should be. In any event we must take COGSA as Congress passed it" (451 F(2d) 800, 815, footnote 18).

The next two pages of defendant's brief (pp. 9 and 10) are filled with quotations from an article entitled "The Container and the Package Limitation" published in the Journal of Maritime Law and Commerce. The author of that article is M. E. DeOrchis, Esq., a partner in the admiralty firm of Haight, Gardner, Poor & Havens. Mr. DeOrchis, and other members of his firm, regularly represent ocean carrier interests in this and other Courts. Mr. DeOrchis, fine advocate that he is, can hardly be presented as a disinterested author. Plaintiff, if it thought necessary, could just as easily quote from an excellent article entitled

"The Law of Shipping Containers", Journal of Maritime Law and Commerce, Vol. 5, No. 3 April 1974, page 507 by Seymour Simon, Esq., a distinguished attorney, who regularly represents cargo interests in litigation against ocean carriers.

If defendant believed it necessary to include in its brief a section on the history behind COGSA, it should have quoted from Judge Anderson's well-researched review of this history in *Encylopaedia Britannica, Inc.* v. *S.S. "Hong Kong Producer"*, 422 F(2d) 7, 11 to 13.

Once again, at pages 11 to 15, defendant argues that if the plaintiff did not like the $500 per package limitation it could have declared a higher value. This argument begs the question. If, as plaintiff claims, the tanks were not packages, there was no need to declare a higher value. Plaintiff considers a recovery based upon the customary freight unit of 2,240 lbs., used by the defendant to calculate its prepaid freight, to be adequate compensation for its loss.

Defendant states, at page 15, that "In principle" *Mitsubishi Int'l. Corp.* v. *S.S. "Palmetto State"*, 311 F(2d) 382, "is on all fours with the matter at bar." It is comforting to know that this case is defendant's best authority. The *"Palmetto State"* case dealt not with a "container" as defendant contends, but rather with what Judge Moore, at page 384, said was "* * * an article completely enclosed in a wooden box prepared for shipment * * *". In the case at bar we are not concerned with a shipper's wooden box, to be destroyed at destination. We are concerned with 2,000 gallon metal tanks, owned by the steamship company, which were "functionally a part of the ship".

Defendant also relies upon *Standard Electrica S. A. Hamburg Sud*, 375 F(2d) 943, a pallet case, which Chief Judge Friendly found no difficulty in distinguishing in *"Mormaclynx"* (*supra*) when, at page 815, he said, "In-

deed, there seems to have been nothing in the shipping documents in that case (*Standard Electrica*) that gave the carrier any notice of the number of cartons." In the case at bar the bill of lading (Exhibit B, p. 39) set forth the name of the product carried, its measurement and its gross weight in pounds.

Defendant, at page 18, lists certain cases, without regard to their applicability to the facts of this case, where defendants were successful. Plaintiff finds it easy to cite several cases where plaintiffs were successful. Thus, *Hartford Fire Insurance Co.* v. *Pacific Far East Line, Inc.*, 491 F(2d) 960 (Feb. 1974), where an electrical transformer bolted to a wooden skid was held not to be a package; *Gulf Italia Co.* v. *S.S. "Exiria"*, 160 F. Supp. 956, aff'd 263 F(2d) 135, cert. den. 360 U.S. 902, where a semiboxed tractor was held not to be a package; *Inter-American Foods, Inc.* v. *Coordinated Caribbean Transport Inc.*, 313 F. Supp. 1334, where the Court held that the individual cartons within a container, rather than the container itself, were the packages; *The West Kyska*, 155 F(2d) 687, cert. den. 329 U.S. 761, where thirteen pieces of steel were billed for freight by the hundredweight, the court held that to be the customary freight unit; *Middle East Agency* v. *The John B. Waterman*, 86 F. Supp. 487, where a large tractor was valued at $500 for each unit of 40 cu. ft.; *J. A. Johnston Co. Ltd.* v. *The Tindefjell and Seelion Navigation Co. S.A. and Concordia Line, A/S*, 1973 A.M.C. 2119, (1973), 2 Lloyds Law Reports 253, where a Canadian Federal Court held that 316 cartons of shoes, and not the containers within which they were loaded, should be considered the packages for the purpose of the package limitation; *Societe Navale Caennaise* v. *Gastin*, Jurisprudence Francaise, October 12, 1968 at 18, where a French court held that 59 bales within a container—and not the container—were packages, because the bill of lading listed the number of bales in the container.

***As to Defendant's "Point I (B)"*—The Intent of the Parties (Defendant's Brief, p. 19 to p. 26).**

Once again, at page 19, defendant concedes that "The tanks are obviously containers." However, once again, defendant fails to follow through and note that this Court in "*Mormaclynx*" (*supra*), at page 815, held that a container was not a package.

Defendant then repeats its argument that since plaintiff referred to the number of tanks in correspondence it intended the tanks to be packages. We responded, in advance, to this argument at page 6 of our main brief on appeal.

Defendant has chosen to overlook the fact that the bill of lading (Exhibit "B"; p. 39) gave only one "measurement" figure and one "gross weight in pounds" figure for the total contents of all the tanks. In addition, and of the utmost importance, the defendant deliberately computed the freight—which it required to be prepaid—not on the basis of the number of its own tanks carried, but rather on the basis of its customary freight unit of 2,240 lbs.

This freight, computed by the defendant upon the basis of its customary freight charge—*did not include the weight of the tanks.* Thus, when defendant's attorney asked the witness John B. Grimes the following question he received the indicated answer:

> "Q. Does the 359,170 pounds include the weight of the tanks? A. It does not." (Exhibit A, p. 33)

How different a computation of freight charges than would have been used for goods packed in some heavy wooden box owned by the shipper. The defendant did not charge any more for carrying its own movable tanks than it would have for carrying its own deep tanks.

Furthermore, the only witness whose deposition was taken (which deposition was offered by the defendant as its Exhibit A; p. 24) clearly testified that the defendant's movable tanks were, at that time, "the only type of operation available for *bulk* shipment of latex" (emphasis ours) (p. 38).

According to defendant, p. 20, plaintiff's "leading (and only) authority is *The Bill,* 55 F. Supp. 780". While *The Bill* is an excellent case, because it holds, at page 783, that the customary freight unit "* * * refers to the unit of quantity weight or measurement of the cargo customarily used as the basis for the calculation of the freight rate to be charged", it is hardly plaintiff's only authority. Plaintiff also relies upon *"Mormaclynx"* (*supra*), a case defendant has been obviously loath to discuss.

Defendant, at pages 21 and 22, quotes extensively from *Rosenbruch* v. *American Export Isbrandtsen Lines, Inc.,* 357 F. Supp. 982, concluding with the rhetorical question, "What distinguishes *Rosenbruch* from this case?" The Judge in *Rosenbruch,* at p. 984, noted the similarity with *Kulmerland* 483 F(2d) 645 (2d Cir. 1973) in that "the cargo description was simply, 'said to contain household goods.' " This is the very same distinguishing point made by Chief Judge Friendly when he distinguished *Standard Electrica* (*supra*) from *"Mormaclynx"* (*supra* at page 815), saying, "Indeed, there seems to have been nothing in the shipping documents in that case that gave the carrier any notice of the number of cartons."

In the case at bar the bill of lading gave the carrier every possible bit of information about the cargo it was carrying in its own 2,000 gallon metal tanks. It set forth the name of the product, its measurements, its gross weight in pounds, along with a warning to "Protect From Freezing". Just as *Standard Electrica* differed from *"Mormaclynx"* so the case at bar differs from both *Standard Electrica* and *Rosenbruch.*

After repeating, at page 24, the frequently stated and frequently repudiated argument that the shipper could have declared a higher value and paid a higher tariff (which would be a waste of money if the tanks were not packages) the defendant goes on to refer to *Sperry Rand Corp.* v. *Norddeutscher Lloyd,* 1973 AMC 1392, which, defendant notes distinguished *"Mormaclynx"*. However, defendant does not refer to the basis upon which Judge Lumbard distinguished *Sperry Rand* from *"Mormaclynx"*. Judge Lumbard noted, at page 1398, that *Sperry Rand* like *Standard Electrica* (but unlike *"Mormaclynx"*) "gave no information of the fact that 190 cartons were inside". As stated above, in the case at bar the plaintiff gave every possible bit of information about the liquid synthetic latex in the bill of lading.

***As to Defendant's "Point I (C)"*—The *Kulmerland* decision, and other matters (Defendant's Brief, p. 26 to p. 28).**

After repeatedly agreeing that tanks are containers "no different from the rectangular containers" (page 26) defendant argues against just such a definition in the Convention for International Transport of Goods Under Cover of TIR Carnets. This Court, in *Kulmerland* (*supra,* at page 647, footnote 2), noted that international conventions "define containers in part as 'having an internal volume of one cubic metre or more' ". Actually, in the case at bar the internal volume of the 2,000 gallon tanks was in excess of nine cubic metres.

At page 28, defendant makes the following strange statement, which is clearly contrary to the stipulated record on appeal—"The shipper had the choice of shipping in drums and U S L container tanks or in bulk in the deep tanks of a vessel". The witness, John B. Grimes stated, "To the Far East at that time, that was the only type of operation (movable tanks) available for bulk shipment of latex".

(Exhibit A, p. 38). That testimony is uncontradicted in the record on appeal.

Defendant then goes on to argue why it thinks the "functional packing unit" test of *Kulmerland* (*supra*) should be applied to this liquid cargo. Plaintiff replied to this anticipated argument in Point III, pages 7 to 10, of its main brief on appeal.

***As to Defendant's "Point II"*—Entitled "Appellant's arguments avoid the issue and are incorrect on the facts and law" (Defendant's Brief, pp. 29 to 31).**

It is only on the next to last page of its brief that defendant, for the first time in any brief in either Court, tries to distinguish the *"Mormaclynx"* case. No doubt it took a little prodding in plaintiff's brief (pages 5 and 6) to obtain even this passing recognition of that landmark case, where a metal container owned by the shipowner was held to be a functional part of the ship.

Plaintiff had specifically called upon the defendant to respond to the following argument:

> "Plaintiff argues that, if a large metal container, owned by the vessel and requested by the shipper, was 'functionally a part of the ship' in the *Mormaclynx* case then the large metal tanks (conceded to be containers), owned by the vessel and requested by the shipper, are functionally parts of the ship in our case." (Plaintiff's main brief on appeal, page 5.)

Defendant's effort, at page 30, to distinguish *Mormaclynx"* consists *first,* of noting that a trucker—agent of the vessel—was present at the loading of the *Mormaclynx* container and receipted for the goods, and *second* that the container was lost after discharge from the vessel.

To answer the *first* claimed distinction it is only necessary to refer to Chief Judge Friendly's stated reason for

the decision— "Still we cannot escape the belief that the purpose of § 4 (5) of COGSA was to set a reasonable figure below which the carrier should not be permitted to limit his liability and that 'package' is thus more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be 'contained'." (451 F(2d) 800, 815).

In both *"Mormaclynx"* and the case at bar the shipper requested the containers. However, in the case at bar the shipper had no choice for these movable tanks were "the only type of operation available for bulk shipment of latex" (Exhibit A, p. 38).

To answer defendant's *second* claimed distinction between the case at bar and *Mormaclynx,* the Court of Appeals in the latter case decided, upon the authority of *David Crystal Inc.* v. *Cunard S. S. Co.,* 339 F(2d) 295, that a clause invalid under COGSA did not spring to life after discharge of the goods from the vessel. In the case at bar there can be no question about COGSA applying, because the synthetic latex was lost before discharge.

On the face of it, defendant's belated effort to distinguish such a well-known case as *"Mormaclynx"* is a weak one. Its weakness is demonstrated by the fact that defendant, at page 29, is forced to call its tanks "drums", after repeatedly conceding they were containers "* * * no different from the rectangular containers * * *" (defendant's brief, p. 26). Finding itself impaled upon terminology making it impossible to distinguish *Mormaclynx,* the defendant blithely shifts from "containers" to "drums", where it figures it has a better chance. This is a strange maneuver by a litigant, who at one time, desired to lay great emphasis upon what it called "the characterizations of the parties" (defendant's brief, p. 17).

The Trial Judge in his opinion said, "The court's conclusion is rested in part upon the parties' own description and

treatment of the containers" (p. 13). Nevertheless, we now see defendant trying to jettison the very description it once relied upon. Such fast literary footwork can hardly help an ocean carrier in the interpretation of what Judge Anderson has labelled "a contract of adhesion." *Encylopaedia Britannica, Inc.* v. *S.S. Hong Kong Producer,* 422 F(2d) 7, 15.

Conclusion

Defendant's 2,000 gallon metal tanks were concededly containers, "* * * no different from the rectangular containers * * *" (defendant's brief, p. 26). As such, they were "functionally a part of the ship." *Mormaclynx* (*supra* at p. 15), and, therefore, not packages.

In addition, this was a *bulk* shipment of liquid synthetic latex. The bill of lading (Exhibit B; p. 39) referred to only one "measurement" figure and one "gross weight in pounds" figure for the total contents of all the tanks. The only deposition witness, John B. Grimes, referred to the shipment as a bulk shipment (p. 38). The defendant, itself, deliberately calculated the prepaid freight on the face of the bill of lading—not on the basis of the number of tanks—but rather on the basis of its printed customary freight unit (Exhibit B; p. 39). Furthermore, just as in a deep tank shipment, the "gross weight in pounds" used to calculate the freight did not include the weight of the tanks (Exhibit A; p. 33), as it most certainly would have had plaintiff shipped goods in its own boxes or drums.

Accordingly, plaintiff's damages, in connection with its lost shipment of liquid synthetic latex, qualify for computation on a "customary freight unit" basis for two separate and distinct reasons, either one of which is sufficient. First, the tanks were not packages, and second this was a bulk shipment.

The judgment of the District Court limiting plaintiff's damages to $500 per tank (container) should be reversed and judgment directed for the plaintiff upon the stipulated freight unit basis in the amount of $27,733.73 (p. 6).

Respectfully submitted,

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